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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

ANDREW C. BAILEY,

Plaintiff,

vs.

WELLS FARGO BANK NA a/k/a
WELLS FARGO HOME MORTGAGE
(WELLS FARGO); LEHMAN
BROTHERS BANK FSB (LEHMAN
BROTHERS); FIRST AMERICAN
TITLE INSURANCE COMPANY
(FIRST AMERICAN); JOHN DOES "1-
1000",

Defendants.

(Chapter 11)

Case No. 2:09-bk-06979-RTBP

Adv. No. 2:09-ap-01731-RTBP

**REPLY TO PLAINTIFF'S
MEMORANDUM IN OPPOSITION
TO DEFENDANTS' WELLS FARGO
BANK, N.A. AND LEHMAN
BROTHERS BANK, FSB'S MOTION
TO DISMISS AMENDED
COMPLAINT**

Defendants Wells Fargo Bank NA a/k/a Wells Fargo Home Mortgage (Wells Fargo), whose true name is Wells Fargo Bank, N.A. ("Wells"), and Lehman Brothers Bank, FSB ("Lehman") (collectively the "Defendants"), by and through counsel undersigned, hereby reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Amended Complaint.

Plaintiff Andrew C. Bailey's ("Bailey") Memorandum in Opposition to the Defendants' Motion to Dismiss Amended Complaint (the "Response") is based on

1 nothing more than mere conjecture. In addition to the reasons set forth in the
2 Defendants' Motion to Dismiss Amended Complaint Pursuant to Fed. R. Bank. P. 7012,
3 the Defendants should be dismissed for the following reasons:

- 4 1) The Response is based on nothing more than mere conjecture which
5 should not be considered by the Court.
- 6 2) The Amended Complaint for Enforcement of Qualified Written
7 Request and Temporary Restraining Order (the "Complaint") does
8 not challenge the validity, priority or extent of the lien at issue.
- 9 3) Lehman has a documented interest in the property at issue (the
10 "Property") that may be enforced by Wells.
- 11 4) Bailey offers no legitimate argument in opposition to that set forth
12 by the Defendants in the Motion.

13 This Reply is supported by the following Memorandum of Points and Authorities.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. Legal Argument**

16 **1. The Response is based on nothing more than mere conjecture which**
17 **should not be considered by the Court.**

18 Other than citation to procedural rules, the Response consists of little more than
19 unsworn and unproven assertions. Bailey's conjecture in the Response does nothing to
20 support his claims. *Kerr v. Wanderer & Wanderer*, 211 F.R.D. 625, 629 (D.Nev. 2002)
21 (citation omitted); *see also Single Chip Systems Corp. v. Intermec IP Corp.*, 495
22 F.Supp.2d 1052, 1062 (S.D. Cal. 2007) (citing *Estrella v. Brandt*, 682 F.2d 814, 820
23 (9th Cir. 1982). And the Court should not consider such conjecture because, for the
24 purposes of the pending Motion, it is limited to considering only the "facts alleged in
25 the complaint, documents attached to the complaint, documents relied upon but not
26 attached to the complaint when authenticity is not contested, and matters of which the
Court takes judicial notice." *Id.* at 1062 (citing *Lee v. City of Los Angeles*, 250 F.3d

1 668, 688-89 (9th Cir. 2001). Considering those alleged facts, documents, and matters
2 of judicial notice alone, Bailey's claims must and do fail.

3 **2. The Complaint does not challenge the validity, priority or extent of the**
4 **lien at issue.**

5 The Response makes several allegations that the Defendants failed to address
6 Bailey's mere recital of Fed. R. Bank. P. 7001(2) as support for the Complaint. To the
7 contrary, it is Bailey's mere recital of the procedural rule that, more than anything else,
8 bolsters the Defendants' argument that they must be dismissed from the Complaint.

9 Fed. R. Bank. P. 7001(2) states that an adversary proceeding is a proceeding "to
10 determine the validity, priority or extent of a lien or other interest in property...." Bailey,
11 in the Response, admits that the lien at issue here is valid and that he owes money. (Dkt.
12 #20, 15:12-13). Further, Bailey admits in the Complaint and the Response that the
13 Complaint is nothing more than an action "for enforcement of the QWR and for
14 discovery." (Dkt. #20, 2:13-14; Dkt. #1:20-23.)

15 Moreover, the Complaint is completely devoid of any allegation challenging the
16 validity, priority or extent of the lien at issue. Rather, Bailey's only allegations in the
17 Complaint regarding the Property itself address the Defendant's authority to foreclose on
18 the Property. (Dkt. #1.) Such allegations are insufficient to support an adversary
19 proceeding under Fed. R. Bank. P. 7001(2) and the Defendant's authority to foreclose on
20 the Property was already sufficiently explained. (Dkt. #14, 2-3, 6-7). Bailey presents no
21 argument in the Response sufficient to contest that explanation.

22 **3. Lehman has a documented interest in the Property that may be enforced**
23 **by Wells.**

24 At the time Wells moved to lift the automatic stay in regard to the Property, it
25 inadvertently failed to state that it was the servicer of the Property. However, this is a
26 fact of no consequence. Although Wells' counsel admittedly believed that Wells was the

1 beneficiary of the Promissory Note and Deed of Trust at issue here prior to the filing of
2 the Motion, when they became aware of their mistaken belief they notified the Court in
3 the Motion.

4 Regardless, as stated in the Motion, Wells had authority to initiate and maintain
5 the Trustee's Sale on behalf of Lehman. *Id.* Bailey does not challenge and even admits
6 that the evidence presented by the Defendants to support Wells' authority, specifically
7 Exhibit A to the Motion, is a portion of the Master Seller's Warranties and Servicing
8 Agreement executed by Wells and Lehman. (Dkt. #20, 12:10-11, 17:12-13. If Bailey's
9 only complaint is that he has not been provided with the entire Master Seller's Warranties
10 and Servicing Agreement, it is a matter of public record easily obtainable at
11 [http://www.sec.gov/Archives/edgar/data/1372936/000112528206005786/](http://www.sec.gov/Archives/edgar/data/1372936/000112528206005786/b414911_ex99-6.txt)
12 [b414911_ex99-6.txt](http://www.sec.gov/Archives/edgar/data/1372936/000112528206005786/b414911_ex99-6.txt) among other places.

13 Bailey's mere conjecture to the contrary does nothing to challenge the supported
14 facts set forth above.

15 **4. Bailey offers no legitimate argument in opposition to that set forth by the**
16 **Defendants in the Motion.**

17 The Motion set forth three arguments supporting the propriety of the Defendants'
18 dismissal from the Complaint. Bailey, in the Response, has done nothing to challenge
19 that propriety.

20 First, Bailey asserts that the Defendants admitted they were not creditors by
21 stating they had no duty to respond to Bailey's alleged Qualified Written Request
22 ("QWR"). To the contrary, the fact that the Defendants had not duty to respond to the
23 QWR is based on the fact that the Defendants' attorneys, and not the Defendants, were
24 provided with a QWR. *Kee v. Fifth Third Bank*, No. 2:06-CV-00602-CW, 2009 WL
25 735048, at *4 (D.Utah March 18, 2009) (*citing Griffin v. Citifinancial Mortgage Co.,*
26 *Inc.*, No. 3:05cv1502, 2006 U.S. Dist. LEXIS 6709, * 6-7, 2006 WL 266106 (M.D.Penn.

1 Feb. 1, 2006). This fact is admitted by Bailey. (Dkt. #20, 3:9-11.) To assert that this is
2 somehow an admission by the Defendants regarding their ability to foreclose on the
3 Property is an unjustified leap in logic.

4 Further, upon information and belief, Wells never responded in whole or in part to
5 the QWR regarding the Property. The QWR attached to the Response as Exhibit A is not
6 the same QWR that has been presented as being provided to Wells. (Lead Case No. 2:09-
7 bk-0679-RTBP, Dkt. # 72, Ex. B.) And Bailey has not and cannot assert that the Real
8 Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.*, provides for a
9 private cause of action to enforce a QWR. It does not.

10 Second, Bailey sets forth no argument to contest the fact that “a non-judicial
11 foreclosure proceeding is not the collection of a ‘debt’ for purposes of the [Fair Debt
12 Collection Practices Act].” *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp.2d
13 1178, 1182 (D.Ariz. 2009) (citing *Hulse v. Ocwen Fed. Bank*, 195 F.Supp.2d 1188, 1204
14 (D.Or. 2002); *Gray v. Four Oak Court Ass’n*, 580 F.Supp.2d 883 (D.Minn. 2008)). Nor
15 does Bailey contest the fact that the Fair Debt Collection Practices Act (“FDCPA”), 15
16 U.S.C. § 1692, *et seq.*, does not provide a private cause of action to enforce a Debt
17 Validation Letter.

18 Third, as set forth above, Bailey makes no legitimate challenge to Wells’ authority
19 to initiate and maintain a foreclosure action.

20 **II. Conclusion**

21 For the foregoing reasons, Wells and Lehman respectfully request that the Court
22 dismiss them from the Complaint with prejudice.

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1 RESPECTFULLY SUMMITTED this 26th day of February, 2010.

2 **TIFFANY & BOSCO, P.A.**

3
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10 ORIGINAL filed electronically with the United
11 States Bankruptcy Court, District of Arizona,
12 this 26th day of February, 2010, and a copy mailed
the 26th day of February, 2010 to:

13 ANDREW C. BAILEY
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16 /s/ Paula D. Hillock

17 7000-003/425807